

**ATTACHMENT B**

**STAFF'S ARGUMENT**

## STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Dana Sutton Kennedy (Respondent Kennedy) has been a Classified Employee of Foothill-De Anza Community College District (the District) since April 28, 2014. Accordingly, she is a "new member" of CalPERS subject to the Public Employees' Pension Reform Act (PEPRA) (Gov. Code § 7522 et seq.). The District is a public school agency that contracts with CalPERS for retirement benefits for its eligible employees. The District's Classified Employees are represented by the Association of Classified Employees (ACE).

On August 27, 2018, the District's Board of Trustees approved a compensation settlement for Classified Employees for 2017 - 2018 and 2018 - 2019 and adopted the 2017 - 2018 and 2018 - 2019 Salary Schedules.

Relevant portions of the compensation settlement for Classified Employees for 2017 - 2018 and 2018 - 2019 state in pertinent part:

The 2017 - 2018 and 2018 - 2019 settlement regarding compensation and other economic matters includes the following:

Effective July 1, 2017:

- Salary Adjustment of 0% on the ACE Classified Salary Schedule, (Appendix C).

Effective July 1, 2018 – June 30, 2019

- Salary Adjustment of 5% on the ACE Salary Schedule (Appendix C), subject to the following terms.
- Terms: On July 1, 2019, the ACE Salary Schedule (Appendix C) shall revert to the 2017 - 2018 Salary Schedule unless another agreement is reached. [¶] . . . [¶]

On October 1, 2018, the District requested that CalPERS review its Cost-of-Living Allowance Memorandum for salary increases in 2017 - 2018 and 2018 - 2019 for all employee groups. The Memorandum states in pertinent part:

Effective July 1, 2017

- Salary Schedule Adjustment: A **Salary Adjustment of "\$0/0%" increase** to all Salary Schedules, (Appendices A, B, B.1, C, C.1, D, D.1, E, and G.) [¶] . . . [¶]

Effective July 1, 2018 – June 30, 2019

Full-time Faculty

- *Salary Adjustment:* A **Salary Adjustment of 5%** on the following full-time faculty Salary Schedules:
- Faculty: F1, F2, F3
- Appendices A and B of the FA Agreement [¶] . . . [¶]

Terms: On July 1, 2019, all Salary Schedules will revert to the 2017 - 2018 schedules unless another agreement is reached.

On October 3, 2018, CalPERS informed the District, “[b]ased on the memo and because the pay is only for the FY 2018/2019, the additional 5% cannot be reported as pay rate; rather it should be reported as Off-Salary Schedule Pay for Classic members, and reflected as such in a written labor policy/agreement. It is not reportable for PEPRAs members.”

On November 18, 2018, ACE’s counsel requested that CalPERS allow the District to report the 5% temporary pay increase for all of its members, including PEPRAs members.

By letter dated February 4, 2019, CalPERS informed ACE’s counsel that its original determination stands. The letter states in pertinent part:

Pursuant to the Memorandum of Understanding (MOU) between the District and ACE, employees were granted a five percent increase effective July 1, 2018, through June 30, 2019. Effective July 1, 2019, this increase will automatically end, and affected pay rates will return to the established pay rate levels that were in effect for the 2017 - 2018 contract year. This temporary increase does not meet the definition of "Compensation Earnable" or "Pensionable Compensation" as defined under the PERL. [¶] . . . [¶]

Only compensation meeting the definition of "Compensation Earnable" for Classic members or "Pensionable Compensation" for PEPRAs members is reportable to CalPERS. Pursuant to the ACE MOU, the five percent increase is only paid for a limited duration and is nullified as of July 1, 2019. Based on the temporary nature of this additional pay, it does not meet the PERL's definition of "normal monthly rate of pay or base pay" under the definition of "Payrate" and "Pensionable Compensation."

Additionally, this temporary increase does not meet the definition of any recognized type of compensation provided under Cal. Code. Regs. section 571.1 which exclusively

delineates the types of compensation that qualify as "Pensionable Compensation." Accordingly, we advised the District to refrain from reporting the provisional increase, since it does not comply with the PERL. The District is required, upon contract with CalPERS, to adhere to the statutes and regulations contained in the PERL. [¶] . . . [¶]

Calculating retirement allowances based upon a temporary pay rate increase would create a liability that by definition would be unfunded as time progresses. CalPERS has a fiduciary responsibility to ensure all compensation reported to our system is compliant with the PERL. [¶] . . . [¶]

On March 11, 2019, ACE filed a Petition for Preemptory Writ of Mandamus, Declaratory Relief and Other Appropriate Relief in Sacramento County Superior Court (Court) (*Foothill-De Anza Association of Classified Employees (ACE) v. California Public Employees' Retirement System*; [Foothill-De Anza Community College District (District) named as the Real Party in Interest]; Case No. 34-2019-800003097.)

On July 10, 2020, the Court dismissed ACE's Writ because there had been no final decision rendered on the pensionability of the temporary increase for "new members." ACE had never appealed CalPERS' determination, thus the matter had never been brought before the CalPERS Board of Administration.

By letter dated October 7, 2020, the District was notified of CalPERS' determination and advised of its appeal rights. The District never appealed CalPERS' determination.

By letter dated November 4, 2020, ACE filed an appeal and requested an administrative hearing. CalPERS informed ACE's counsel that appeal rights were not provided to ACE. However, CalPERS agreed that if an impacted member chose to appeal CalPERS' determination, he/she would be granted appeal rights.

On February 23, 2021, Respondent Kennedy filed an appeal and requested an administrative hearing.

A hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH) was held on July 14, 2022. Respondent Kennedy was represented by counsel at the hearing. The District did not appear at the hearing.

The sole issue for determination was whether CalPERS erred in determining that a 5% pay increase for the 2018 - 2019 contract year, while pensionable income for "Classic members," was not pensionable income for Respondent Kennedy because she is a "new member."

Reportable compensation for Classic members is referred to as "Compensation Earnable." (Gov. Code §§ 20636, 20636.1.) Compensation Earnable is defined as the

member's "Payrate and special compensation." Special compensation is defined as "payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions." (Gov. Code, § 20636, subd. (c)(1).) California Code of Regulations, title 2, (Regulation) section 571 applies to "Classic" members and contains a lengthy list of items that qualify as special compensation. Regulation section 571's list is similar – but not identical - to the list included under the definition of "Pensionable Compensation" for new members provided in Regulation section 571.1 subdivision (b).

The term Off Salary Schedule Pay (OSSP) appears in Regulation section 571 subdivision (a) and is defined as:

Compensation in addition to base salary paid in similar lumpsum amounts to a group or class of employees. These payments are routinely negotiated through collective bargaining in lieu of increases to the Salary Schedule. These payments are based on a similar percent of scheduled salary not to exceed 6% per fiscal year. The contracting agency or school employer may adopt similar action for non-represented groups or classes of employment as were negotiated through collective bargaining.

This language was added to Regulation section 571 in 1999. OSSP was never incorporated into Regulation section 571.1. CalPERS offered into evidence the Rulemaking File for the Amendment to Regulation section 571 to add OSSP. The "Initial Statement of Reasons" provides:

CalPERS became aware that school employers frequently negotiate "Off-Salary-Schedule Pay" in lieu of a pay raise, which is then paid and reported as earned for all members of a group or class. CalPERS has determined that this type of pay satisfies the definition of compensation earnable at Gov. Code section 20636(c), and the regulatory funding criteria for an item of special compensation at Gov. Code section 571(b). Thus, it should be included in the exclusive list of such items at 571(a).

CalPERS argued that the specific inclusion of "Off-Salary-Schedule Pay" in the special compensation regulation pertaining to Classic members, and the absence of the term in any statute or regulation pertaining to new members, signifies that such payments are not Pensionable Compensation for new members. CalPERS also argued that the fact that OSSP is treated as "special compensation" rather than "Payrate" for Classic members means that it cannot be considered "Payrate" for new members.

The ALJ rejected CalPERS' arguments, reasoning, the fact that CalPERS chose to include OSSP in its regulation as a form of special compensation for Classic members does not prove that the legislature intended that these types of payments not be considered "Payrate" for either Classic members or new members. The ALJ also found that the "Initial Statement of Reasons" establishes that the 1999 Amendment codified OSSP as reportable compensation under the category of special compensation. The Amendment was made to conform with CalPERS' determination that these payments

met existing statutory requirements and should therefore be included in the “exclusive list of such items.” The Amendment corrected what CalPERS considered an omission in the list of items that are reportable compensation for Classic members.

The ALJ held that pursuant to the Agreement between the District and ACE, Respondent Kennedy received a 5% increase during the entire 2018 - 2019 contract year. The pay increase was disclosed on the District’s publicly available Salary Schedule. The increase was given to all similarly situated employees; it was not paid solely to Respondent Kennedy. The increase was not made with the goal of unlawfully increasing Respondent Kennedy’s retirement benefits.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ granted Respondent Kennedy’s appeal. The ALJ found that Respondent Kennedy met her burden of proof, by a preponderance of the evidence, that CalPERS erred in its determination that the 5% pay increase she received in the 2018 - 2019 contract year is not Pensionable Compensation because she is a new member. The ALJ held that the 5% pay increase paid to her from July 1, 2018, to June 30, 2019, is Pensionable Compensation.

For all the above reasons, staff argues that the Proposed Decision should be adopted by the Board.

November 16, 2022

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